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Melissa Grimes

Eli Humphries

Tim McKeen

Andreah Frenn

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Melissa Grimes, Eli Humphries, Tim McKeen & Andreah Frenn[*]

I. Introduction

This year, the Ohio courts issued several landmark decisions in oil and gas law. These decisions help to advance Ohio's position regarding several topics prevalent in the oil and gas law industry.

* Melissa Grimes and Eli Humphries are associates and Tim KcKeen is a member in the Wheeling, West Virginia office of Steptoe & Johnson, PLLC. Andreah Frenn is a recent summer associate of Steptoe & Johnson, PLLC.

II. Statutory Law

Between August 1, 2016 and July 31, 2017, Ohio has not enacted any major legislation pertaining to oil and gas law.

III. Common Law

Several Ohio courts have issued decisions which impact the landscape of oil and gas law in the state, most notably in relation to the application and interpretation of the Dormant Mineral Act.

A. Dormant Mineral Act (DMA)

1. Retroactivity of 2006 Version of DMA

Following the enactment of the 2006 version of the Ohio Dormant Mineral Act ("ODMA"), there was confusion in the courts about whether the 2006 version would apply retroactively to previously abandoned mineral rights, or prospectively to rights claimed following the date of its enactment. The Supreme Court of Ohio answered this question in *Corban v. Chesapeake Exploration, L.L.C.* when it held, in part, that the 2006 version of the ODMA (1) applies to claims asserted after its effective date; and (2) specifies the required procedure for having dormant mineral rights deemed abandoned and merged with the surface estate.[1]

The Court stated that the 2006 version of the ODMA is "not expressly retrospective, and it applies prospectively to all claims that mineral rights have been abandoned that are asserted after its effective date."[2] In practice, this ruling means that a practitioner need only check to see if there was a judicial ruling prior to the 2006 amendment, and, if not, then the 2006 procedures would apply.[3] Overall, the Court held that the 2006 ODMA applies to all claims asserted after June 30, 2006, even if the mineral rights were abandoned prior to the amendment.[4] Thereafter, the Court either

1. Corban v. Chesapeake Expl., L.L.C., 149 Ohio St.3d 512, 76 N.E.3d 1089, 1097-99 (2016).

2. *Id.* at 1098. *See, e.g.*, Walker v. Shondrick-Nau, 149 Ohio St.3d 282, 74 N.E.3d 427, 430-31 (2016) (citing *Corban* in deciding that a claim for mineral rights made in 2012 is subject to the 2006 version of the act); Albanese v. Batman, 148 Ohio St.3d 85, 68 N.E.3d 800, 804 (2016) (using the holding in *Corban* to state that a claim filed after June 30, 2006 was subject to the 2006 version regarding procedural requirements).

3. Alexander T. McElroy, *Avoid These Two Pitfalls When Applying Ohio's Newly Interpreted Dormant Minerals Act: Practice Tips*, 31 OHIO LAWYER 30, 31 (2017).

4. *Corban*, 76 N.E.3d at 1097-99.

affirmed or reversed several cases which were stayed pending the outcome of *Corban*.[5]

Additionally, the Court held that the 1989 version of the ODMA was not self-executing and did not automatically transfer ownership of dormant mineral rights by operation of law.[6] Rather, the surface holder of the land in question was required to bring a quiet title action "seeking a decree that the mineral rights had been abandoned in order to merge those rights into the surface estate."[7] Similarly, the Court held that the 2006 version also does not self-execute, but instead lists the procedural method required in order to establish the surface owner's marketable record title in the mineral estate.[8] Overall, the Supreme Court of Ohio specifically requires that the landowner would have commenced a quiet title action in order to obtain abandoned minerals under the 1989 ODMA. The quiet title action had to be filed before the ODMA was amended on June 30, 2006. If there was not a quiet title action prior to 2006, this holding requires that the surface owner follows the procedure outlined in the 2006 version of the ODMA in order to assert a claim.

Since the decision in *Corban*, the Supreme Court of Ohio has reiterated its holding. For example, in *Walker v. Shondrick-Nau*, the Court stated that "the 2006 version of the Dormant Mineral Act applies to all claims asserted after 2006 alleging that the rights to oil, gas, and other minerals automatically vested in the owner of the surface estate prior to the 2006 amendments."[9] Similarly, in *Albanese v. Batman*, the Court expanded upon the holding in *Corban* and stated:

> [U]nder the 2006 ODMA, in order for a severed mineral interest to be deemed abandoned and vested in the surface owner (1) the mineral interest cannot be in coal, (2) the mineral interest cannot be held by certain entities, (3) no savings event can have

5. *See* Carney v. Shockley, 2016-Ohio-5824 (2016), *aff'g*, 2014-Ohio-5829 (Ohio Ct. App. 2014); Eisenbarth v. Reusser, 2016-Ohio-5819 (2016), *aff'g*, 2014-Ohio-3792 (Ohio Ct. App. 2014); Tribett v. Shepherd, 2016-Ohio-5821 (2016), *rev'g*, 2014-Ohio-4320 (Ohio Ct. App. 2014); Thompson v. Custer, 2016-Ohio-5832 (2016), *rev'g*, 2014-Ohio-4320 (Ohio Ct. App. 2014); Dahlgren v. Brown Farm Props., L.L.C., 2016-Ohio-5818 (2016), *rev'g*, 2014-Ohio-4001 (Ohio Ct. App. 2014); Swartz v. Householder, 2016-Ohio-5817 (2016), *rev'g*, 2014-Ohio-2359 (Ohio Ct. App. 2014).

6. *Corban*, 76 N.E.3d at 1097.

7. *Id.*

8. *Id.* at 1097-99.

9. *Walker*, 74 N.E.3d at 431.

> occurred during the relevant period, *and* (4) the surface owner "shall" have served notice and filed the required affidavit.[10]

The Court noted that the word "shall" means that the notice and affidavit obligations are mandatory, further exemplifying the fact that the 2006 ODMA provides procedural requirements.[11]

In *Harmon v. Capstone Holding Co.*, the Seventh District Court of Appeals affirmed the decision of the Court of Common Pleas of Noble County that a complaint filed in 2013 was subject to the 2006 version of the ODMA.[12] The court noted that "[a]ny attempt to declare mineral interests abandoned after June 30, 2006 must comply with the notice requirements of the 2006 DMA."[13] Therefore, because the appellants did not comply with the notice requirements set forth in the 2006 version and because they failed to provide notice to the interest holder of record, the court held that the mineral interests in question were to remain with the record holder.[14] Overall, this holding exemplifies the court's intent to strictly adhere to the requirements of the 2006 ODMA for any claim made after its enactment.

2. Delay Rental Payments

Additionally, in *Corban v. Chesapeake Exploration, L.L.C.*, the Court answered whether the payment of a delay rental is a "title transaction" or "savings event" for purposes of the ODMA. The Court answered this question in the negative and held that the payment of delay rental is not a saving event under either the 1989 DMA or 2006 amendment because it is not "a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located," as required under Ohio Rev. Code Ann. § 317.08.[15] Furthermore, the Court noted that a title transaction is a transaction that affects title to any interest in land,[16] which cannot be said for a delay rental payment.[17] In conclusion, the Court stated that "[b]ecause a delay rental payment does not affect title to any interest in land, occurs outside of the chain of title, and is not filed or

10. *Albanese*, 68 N.E.3d at 805 (emphasis in original).
11. *Id.*
12. 2017-Ohio-4155, ¶ 18 (Ohio Ct. App. June 5, 2017).
13. *Id.* at ¶ 13.
14. *Id.* at ¶¶ 15-17.
15. *Corban*, 76 N.E.3d at 1099.
16. *Id.* (citing OHIO REV. CODE ANN. § 5301.47(F) (West 2017)).
17. *Id.*

recorded in the office of the county recorder, it is neither a title transaction nor a saving event."[18]

In *Bohlen v. Anadarko E&P Onshore, L.L.C.*, an oil and gas lease contained a one-year primary term, a delay rental clause of $5,500 per year for deferring commencement of a well, and an addendum requiring the lessee to pay at least $5,500 to the lessor in any year that the royalty payments did not reach the $5,500 amount.[19] Two wells were drilled within the first year; one well produced no gas, while the other well has produced gas since inception.[20] In the years 2008 through 2013, annual payments to the lessor were between $4,200 and $5,400.[21] The Supreme Court of Ohio held that the underpayment by the lessees of the minimum annual rental did not entitle the lessors to a forfeiture of the lease under the unrelated delay-rental clause because a well was drilled in the first year and therefore the delayed rental clause did not apply.[22] The Court relied heavily on the plain language of the contract and the fact that there was not an express forfeiture provision in the "plain language" of the lease.

3. Royalty Interest

In *Devitis v. Draper*, the Seventh District Court of Appeals answered whether a royalty interest in an oil and gas estate is subject to abandonment under Ohio Rev. Code § 5301.56.[23] Drawing parallels to the decision in *Pollock v. Mooney*, where the court determined that a royalty interest was subject to extinguishment under Ohio's Marketable Title Act, the court held that oil and gas interests can be subject to abandonment.[24] In addition to the parallel between *Pollock* and the instant case, the court stated that a royalty interest is "one stick in the bundle of the five attributes of a severed mineral estate," and therefore it is an interest subject to abandonment.[25]

4. "Heirs" Asserting a Claim Under the DMA

In addition to questions surrounding the procedural applicability of the ODMA, many courts have also struggled with statutory interpretation. In

18. *Id.*
19. Bohlen v. Anadarko E&P Onshore, L.L.C, 150 Ohio St.3d 197, 80 N.E.3d 468, 469-70 (2017).
20. *Id.* at 470.
21. *Id.*
22. *Id.* at 475.
23. 2017-Ohio-1136 (Ohio Ct. App. Mar. 20, 2017).
24. *Id.* at ¶¶ 14-17.
25. *Id.* at ¶ 18.

situations where there were various claimants coming forth regarding title to mineral rights, the courts were required to rule on the meaning of the definition of "holder" under the ODMA. According to Ohio Rev. Code Ann. § 5301.56(A)(1), "holder" means "the record holder of a mineral interest, and any person who derives the person's rights from, or has a common source with, the record holder and whose claim does not indicate, expressly or by clear implication, that it is adverse to the interest of the record holder."[26] In *Warner v. Palmer*, the Seventh District Court of Appeals emphasized the language "any person who derives the person's rights from, or has a common source with, the record holder" in its holding that the definition of "holder" includes "heirs," as "an heir can be a holder as his rights can 'succeed to the rights of' the record holder."[27] In practice, this holding means that heirs could potentially have standing to challenge a surface owner's notice of abandonment.[28]

B. Post-Production Costs

In *Lutz v. Chesapeake Appalachia, L.L.C.*, the Supreme Court of Ohio declined to answer whether Ohio follows the "at well rule," which permits the deduction of post-production costs, or some version of the "marketable product rule," which limits the deduction of post-production costs under certain circumstances.[29] Instead, the Court stated that an oil and gas lease is subject to the traditional rules of contract construction and therefore the rights of the parties are controlled by the specific language of their lease agreement.[30] Therefore, the Supreme Court of Ohio has declined to issue a blanket ruling upon the issue of post-production costs and instead will be decided by trial courts on a case-by-case basis. This case is notable because it again exemplifies Ohio's position regarding the importance of basic contract law with oil and gas leases.

C. Land Men as Real Estate Brokers

In *Dundics v. Eric Petroleum Corp.*, the Seventh District Court of Appeals upheld a Mahoning County ruling that landmen must be licensed real estate brokers to receive compensation for negotiating oil and gas

26. OHIO REV. CODE ANN. § 5301.56(A)(1) (West 2014).

27. 2017-Ohio-1080, ¶ 25-26 (Ohio Ct. App. Mar. 22, 2017).

28. James A. Carr II, *The Ohio Dormant Mineral Act: Notable Decisions*, OHIO OIL & GAS ASS'N 10, 11 (2017).

29. 71 N.E.3d 1010, 1010 (Ohio 2016).

30. *Id.* at 1013.

leases.[31] The opinion consists heavily of the interpretation of Ohio Rev. Code Ann. § 4735.21, which states in relevant part:

> No right of action shall accrue to any person, partnership, association, or corporation for the collection of compensation for the performance of the acts mentioned in section 4735.01 of the Revised Code, without alleging and proving that such person, partnership, association, or corporation was licensed as a real estate broker or foreign real estate dealer.[32]

Furthermore, the relevant statute defines "real estate broker" as one who engages in certain specified conduct for compensation, such as one who "sells, exchanges, purchases, rents, or leases, or negotiates the sale, exchange, purchase, rental or leasing of any real estate . . . ."[33] Therefore, the court's decision focused on whether oil and gas rights are considered "real estate." The court relied in large part on the Supreme Court of Ohio's decision in *Chesapeake Exploration L.L.C. v. Buell* to reach the conclusion that an oil and gas lease affects the surface estate, and thus an oil and gas lease pertains to real estate.[34] Therefore, the real-estate-broker rule applies to landmen who are compensated to negotiate oil and gas leases.[35]

IV. Conclusion

As oil and gas law continues to develop around the country, Ohio has also evolved through both statutory and common law actions. The decisions issued in this past year have already had a tremendous impact on oil and gas law and carry large implications for the future.

31. 2017-Ohio-640, ¶ 26-27, 79 N.E.3d 569, 576 (Ohio Ct. App. 2017).
32. *Id.* at ¶ 10.
33. *Id.* at ¶ 11 (citing OHIO REV. CODE ANN. § 4735.01 (West 2017)).
34. *Dundics*, 2017-Ohio-640 at ¶¶ 19-23.
35. OHIO REV. CODE ANN. § 4735.21 (West 2017).